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No. _____

IN THE

Supreme Court of the United States

October Term, 1990

IN RE: JOSEPH M. EATON BUILDERS, INC.,
Debtor.

JAMES A. LEWIS, ESQUIRE, TRUSTEE FOR
JOSEPH M. EATON BUILDERS, INC.,
Petitioner,

v.

THOMAS J. and LINDA M. DIETHORN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LEE MARKOVITZ, ESQUIRE
Counsel of Record
J. KERRINGTON LEWIS, ESQUIRE
LEWIS & STOCKEY
1040 Fifth Avenue
Pittsburgh, Pennsylvania 15219
(412) 391-0818
Counsel for Respondents
Thomas J. and Linda M. Diethorn

Batavia Times Publishing Co.
Harold L. Berkoben
Pittsburgh, Pa. (412) 881-7463

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Counter-Statement of the Question Presented

Was the decision of the United States Court of Appeals for the Third Circuit in error and in conflict with other decisions, where it was held that debtor's payment made within ninety (90) days of bankruptcy filing was not an avoidable preference because (1) it did not allow creditors to receive more than they would have received under a Chapter 7 distribution and (2) the payment was made as part of a contemporaneous transfer for new value?

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Statement of Jurisdiction

The United States Court of Appeals for the Third Circuit entered its judgment on January 12, 1990, and, on February 13, 1990, it denied Petitioner's Petition for Rehearing. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. Section 1254(1).

Statute Involved

The Bankruptcy Code's definition of an avoidable preference under 11 U.S.C. Section 547(b), provides in relevant part:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made—
>
> (a) on or within ninety (90) days before the date of the filing of the petition . . .
>
> (5) that enables such creditor to receive more that such creditor would receive if—
>
> (a) the case were a case under chapter 7 of this title;
>
> (b) the transfer had not been made; and
>
> (c) such creditor received payment of such debt to the extent provided by the provisions of this title.
>
> (c) The trustee may not avoid under this section a transfer—
>
> (1) to the extent that such transfer was—
>
> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
>
> (B) in fact a substantially contemporaneous exchange . . .

REASONS FOR DENYING THE WRIT

A. The Third Circuit did not re-define the term "antecedent debt," and did nothing more than apply a well known section of the Bankruptcy Code, Section 547(c).

The decision of the Third Circuit is based on 11 U.S.C. Section 547(c) which provides as follows:

> "(c) The trustee may not avoid under this section a transfer—
>
> (1) To the extent that such transfer was—
>
> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
>
> (B) in fact a substantially contemporanous exchange . . ."

This statutory law was applied to the facts (none of which were in dispute at any stage of this case) that, in entering into this settlement agreement, debtor was not only having its title to the real estate made clear marketable, *but was also receiving a $22,000.00 increase in the value of the real estate which debtor had never bargained for before.*

The Third Circuit correctly stated that in reaching the litigation settlement. "[w]hat Eaton received was not freedom from liability on an antecedent debt, but the freedom from risk of litigation *together with the raise in the value of the property which resulted when the lis pendens was lifted.*" (emphasis added)

(The Petitioner is incorrect if he is saying Respondents never made this agrument. In fact, this argument was made to and rejected by the Bankruptcy Court. In rejecting the argument, the Bankruptcy Court denied a stipulated fact—that the Diethorns had increased the value of the real estate by $22,000.00).

It was the increased value of the real estate accruing to the debtor that distinguishes this litigation settlement from other settlements. This distinction is apparently lost upon Petitioner-trustee when he claims that the Third Circuit is re-defining the term "antecedent debt" and opening a loophole for lawsuits prior to the bankruptcy filing.

In its footnote no. 4, Petitioner theorizes that, in upholding Respondent's equitable lien in the real estate—originating from the common law of Pennsylvania—as an alternate basis for its decision, the Third Circuit erred because it cannot uphold a state law lien when to do so would frustrate federal policy. In fact, federal policy is not being subverted or frustrated in the least. The case at bar is on all fours with a 1981 Third Circuit decision. *In re Gebco Investment Corp.*, 641 F.2d 143 (3rd Cir. 1981). In the nine (9) years since *Gebco* was decided, there has been no rush to the state courthouse door, as Petitioner fears, nor any frustration to any federal policy embodied in the Bankruptcy Code.

B. The Third Circuit's decision is not in conflict with decision from other circuits and in no way detracts from the Uniform administration of the Bankruptcy Code.

Petitioner claims there is a conflict between this Third Circuit decision and the Seventh Circuit decision in *In re Energy Cooperative, Inc.*, 832 F.2d 997 (7th Cir. 1987). In *Energy Cooperative*, the debtor anticipatorily breached a contract to purchase crude oil from a supplier. There had been no performance by either debtor or supplier. Supplier sued debtor for lost profits. Debtor paid supplier in a settlement and filed for bankruptcy relief less than ninety (90) days later. The Seventh Circuit, in ruling that the payment to supplier was an avoidable preference, held, *inter alia*, that the payment was not a contemporaneous exchange, stating: "The contemporaneous exchange exception, Section 547 (c)(1), does not apply because [supplier] did not give new value to [debtor]. "*In re Energy Cooperative, Inc., id.* at 1002.

In the case at bar, the Respondents did give debtor new value—$22,000.00 worth of new value in the form of clear and marketable title. This stipulated fact is specifically relied upon by the Third Circuit in its application of Section 547(c), and is completely ignored in Petitioner's argument. Once again, in characterizing the Third Circuit's opinion as standing for the proposition that freedom from the risk of litigation alone constitutes new value, Petitioner plainly misstates the Third Circuit's opinion.

Furthermore, none of the cases cited by Petitioner conflicts even remotely with the Third Circuit decision. In none of those cases was the transfer made in a contemporaneous exchange for new value.

C. The Third Circuit's decision in this case does not conflict with its decision in *In re Johnson Allen*.

In re Johnson-Allen, 871 F.2d 421 (3rd Cir.), cert. granted, 110 S. Ct. 49 (1989), concerns the question of whether an obligation to make restitution payments to the Pennsylvania Department of Public Welfare, arising out of a Criminal proceeding, is a dischargeable debt under the Bankruptcy Code. That case has no issues in common with the case at bar, can offer no guidance on this case, and presents absolutely no conflict with the case.

D. The Third Circuit's decision has, as a separate and second basis, a finding that the pre-petition transfer is not an avoidable transfer for failure to satisfy Section 547(b)(5).

In addition to finding the pre-petition transfer to be part of a contemporaneous exchange for new value, the Third Circuit also found that the payment would be considered in satisfaction of an equitable lien arising out of the common law of Pennsylvania, and that such lien could not have been defeated by the trustee's avoidance powers. Consequently, Respondents did not receive more than they would have under Chapter 7 distribution.

Petitioner completely ignores this second holding by the Third Circuit, other than the bald, unsupported contention—mentioned above—that upholding such a common law equitable lien serves to frustrate federal policy.

Respectfully submitted,

LEE MARKOVITZ, ESQUIRE
Counsel of Record
LEWIS AND STOCKEY
1040 Fifth Avenue
Pittsburgh, Pennsylvania 15219
(412) 391-0818
Attorney for Respondents
Thomas J. and Linda M. Diethorn